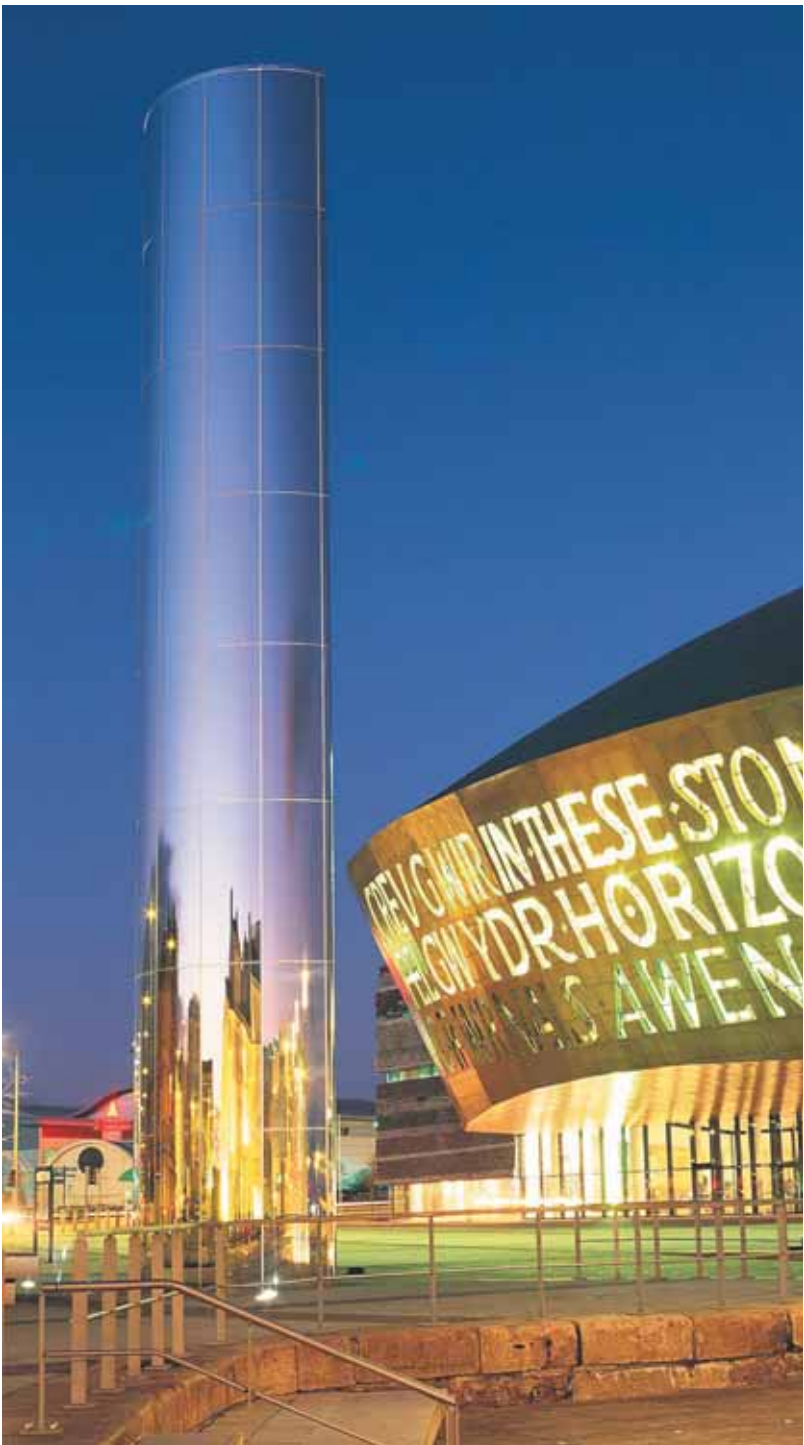


A guide to investing in Wales

Appendix 2 – Creating a workforce



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Immigration

Overseas nationals who come to the UK are subject to immigration control. For the purposes of this summary, overseas nationals are non-UK or European Economic Area ('EEA') nationals. Nationals of some EEA countries are subject to certain limited initial controls that fall outside the scope of this section.

The immigration status of overseas nationals will depend on the immigration category in which they have secured leave (permission) to enter or to remain in the UK. The immigration group to which they are assigned will depend on what they intend to do in the UK.

Information and guidance is available from the UK Border Agency website at www.ukba.homeoffice.gov.uk. Overseas nationals who need to know whether they will need a visa and how to go about this should visit www.ukvisas.gov.uk. Links to overseas visa and consular services offices are available from this website.

Visitors

Visitors (including visitors intending to do business in the UK) are permitted to enter (and remain – subject to certain restrictions) the UK for up to six months at a time. Business visitors must have enough money to support and accommodate themselves without working or without help from public funds during their visit and they must leave the UK at the end of their visit.

Visitors must be able to demonstrate that they can meet the costs of their return or onward journey. Visitors intending to do business must also demonstrate that they only work abroad and have no plans to base themselves in the UK and that they do not plan to work, produce goods or provide services in the UK.

Business visitors can, however, attend meetings with UK businesses or negotiate and enter into contracts with them, attend trade conferences and undertake training in techniques and work practices employed in the UK providing the training is confined only to observation and familiarisation.

Business visitors can also undertake fact-finding, check details and examine goods, deliver goods from abroad, represent a foreign IT or machine manufacturer coming to install, service or modify its equipment, act as consultants to a UK firm provided they are employed abroad directly or under contract by the same company or group of companies.

Visitors who wish to do business can engage in very limited representative maintenance activities but they must not get involved in project management. Business visitors must not engage in employment; for example, they must not sit at a desk and conduct normal day-to-day activities. Business visitors are thus eligible to come to the UK to engage in activities as a pre-cursor to the establishment of a UK business.

Visitors cannot switch into any other immigration category from within the UK.

The UK Border Agency is currently reviewing the visitor immigration category as part of a wider radical overhaul of the immigration system. Current indications are that there will be no significant changes to the rules or to the length of leave granted to (business) visitors.

Skilled and experienced workers

Overseas nationals who wish to enter or remain in the UK for the purposes of taking up employment or to establish or join a business must ensure they secure the appropriate permission (leave) before they travel to the UK for these purposes or, if they are already in the UK, before they start to pursue their activities.

The UK Government recently introduced a points-based system for determining which overseas nationals can come to the UK (or stay in the UK) to work or to engage in business. There are five Tiers. In order to secure permission to work in the UK overseas nationals will need to fall within one of the relevant Tiers.

Tier 1 (highly skilled workers, entrepreneurs, investors and post-study work) became fully operational in June 2008; Tier 2 (employment) and Tier 5 (temporary workers and youth mobility) became operational in November 2008; Tier 3 (low skilled workers) does not, at the time of writing, have an implementation date; and Tier 4 (students) became operational in March 2009. With the exception of Tier 1 applicants, overseas nationals will require a sponsor before permission to come to the UK can be granted.

The following are the main categories of relevance to overseas nationals wishing to work or to do business in the UK under the points-based system:

Tier 1 – Highly skilled migrants

Tier 1 permits are available to individual applicants in four sub-categories:

- *General* – available to highly skilled workers who wish to look for employment in the UK. Candidates are assessed by reference to their academic qualifications, their age, their previous connection (if any) with the UK and their earnings in 12 of the previous 15 months prior to the application.
- *Entrepreneurs* – those investing in the UK by engaging in the managing of a business – they must have £200,000 in a regulated financial institution under their control and disposable in the UK.
- *Investors* – high net worth individuals making a substantial financial investment – they must show that they have no less than £1m in a regulated financial institution and disposable in the UK or personal assets exceeding £2m. Investors can work in paid employment.
- *Post-study work* – recent graduates of UK educational institutions can stay on in (or return to) the UK after they complete their studies for up to two years to look for work or to engage in business (see below).

Application forms are completed on-line and, to qualify, applicants must achieve the requisite minimum number of points (currently 75 points). All applications must be supported by independent verifiable evidence.

Apart from the investor category, all Tier 1 applicants must also demonstrate that they have proficiency in the English language (10 points) and funds to maintain themselves and any dependants when they first arrive in the UK (10 points).

Successful applicants (apart from those on post-study work) will be granted leave to enter (or remain in) the UK for an initial period of three years and, provided they continue to meet the criteria, they will be entitled to apply for a further two-year permit. After that, provided they are eligible, they should be able to apply for leave to remain in the UK indefinitely (settlement).

Dependants of overseas nationals granted leave to enter or remain in the UK under Tier 1 (apart from post-study work) may enter and/or remain in the UK along with the Tier 1 permit holder.

Tier 2 – Skilled workers with a job offer

Tier 2 replaces the former work permit scheme. Tier 2 is aimed at enabling UK employers to recruit individuals to fill particular jobs that cannot be filled by a UK or EU worker. It covers both inter-company transfers, where an overseas company wishes to transfer a member of staff to work in its UK associated company, as well as the appointment of an overseas national following a recruitment search conducted across the resident labour market (UK and EU).

From November 2008, overseas nationals wishing to take up employment with an established business in the UK will require a Certificate of Sponsorship. This is a virtual document. The UK-based employer will first need a licence to issue Certificates of Sponsorship. Only UK-based employers who have registered on the Sponsorship Register will be licensed to issue Certificates of Sponsorship. Registration will be permitted to those UK-based employers who can demonstrate that they employ only those lawfully entitled to work in the UK and that they maintain robust HR systems.

An application for a Sponsor's Licence is made on-line at www.ukba.gov.uk and a prescribed list of documents must then be submitted evidencing that the applicant is a UK-based employer e.g. latest accounts, evidence of registration for PAYE purposes. Before issuing a licence, UK Border Agency Account Managers will normally arrange a compliance visit at the UK establishment to check that any overseas nationals already working in the UK are lawfully employed and that the business has HR systems in place that will enable the would-be sponsor to comply with its obligations to maintain accurate and up-to-date records of the whereabouts of the overseas national. In particular, the UK Border Agency will need to be satisfied that the would-be sponsor has an adequate reporting structure to ensure that, if an overseas national is unexpectedly absent from the workplace, where that absence is unauthorised this will be reported within 10 days. If the UK Border Agency is satisfied that the would-be sponsor can comply with these obligations (and there is no history of illegal working) it will grant an 'A' rating. If it is not satisfied, it may decline to register the would-be sponsor altogether at that stage or allocate a 'B' (temporary) rating. In each case, the would-be sponsor can take steps to put right the deficiencies identified by the UK Border Agency which can then lead to registration.

A Sponsor's Licence is valid for four years. If a UK business has a number of branches, it can choose between becoming licensed as a single body or securing licences for each of its branches.

To be eligible to come to the UK under Tier 2, overseas nationals will require a job offer together with the Certificate of Sponsorship from a licensed sponsor, and to score sufficient points (based on qualifications and prospective earnings) to qualify. Points must also be obtained for English language ability and the sufficiency of funds available when overseas nationals first arrive in the UK.

If the UK employer wishes to extend overseas nationals' leave to remain in the UK longer than the initial period of grant they (both the Sponsor and the employee) must continue to meet the criteria. Overseas nationals granted leave in this category will be able to bring their dependants to the UK.

Graduates

Overseas national graduates of a UK institution may take up employment or establish or join an existing business in the UK. Such graduates will be eligible to apply for a visa under Tier 1 (post-study work) as described above and may later become eligible to remain in the UK under one of the other Tier 1 categories – most frequently Tier 1 (general).

A UK-based employer with an appropriate Sponsor's Licence wishing to employ such a graduate may, however, prefer to issue a Tier 2 Certificate of Sponsorship provided the job and the graduate meet the eligibility criteria.

Graduates of non-UK/EU institutions would need to secure leave as described in the above sections in order to take up employment or engage business in the UK.

Sole representatives of overseas firms

This category falls outside the points-based system described above.

Where an overseas business has no other presence in the UK, an overseas national who is employed by that overseas entity may come to the UK for a period of up to 18 months to act as a sole representative to establish a subsidiary or register a branch in the UK. If the overseas business has a legal entity in the UK but does not employ staff or transact business, then a sole representative visa may still be granted.

To qualify for a sole representative visa, the overseas national must provide a full description of the parent company's activities, including details of assets and accounts and a job description, contract of employment and summary details. Evidence of the overseas national's employment with the overseas business, his seniority and the ability to support himself and dependants without public funds must also be demonstrated. Applicants must be able to demonstrate a very good track record in the same, or a closely related, field of work to show why they have been appointed.

Dependants of the sole representative may accompany the sole representative to the UK.

The application process

The UK Government has rationalised the application process and applications are made on-line with supporting documentation (normally independently verifiable evidence) which must be submitted within 10 days. Certain categories of applicant may be interviewed.

All overseas nationals will be required to provide biometric finger scans as part of the application process. The UK Government has appointed agents overseas to undertake this work. From late 2008, biometric identity cards will be issued to those who successfully apply while already in the UK.

Employees

As in other parts of the UK and the EU, employment law in England and Wales is fast developing and specific advice should always be taken on the up-to-date position.

Some of the key principles of employment law in England and Wales are summarised below:

- England and Wales do not follow the doctrine of employment-at-will. Further, under the 'unfair dismissal' legislation, an employee's job cannot be treated purely as a contractual right terminable upon appropriate notice.
- On the first day of employment, a contract of employment automatically comes into existence. The terms of the contract are those stated in the interview and/or set forth in a letter offering or confirming the job.
- In addition, employers are required to provide employees with a written statement of terms which must set forth certain specified particulars of the employment relationship. However, it is worth noting that the statement of particulars does not necessarily comprise the entire 'contract' between employer and employee. Even if there is no written contract, there are certain terms and conditions that will be implied into the relationship.
- With the exception of a common law claim for breach of the employment contract, almost all employment claims (including discrimination) must be brought before an employment tribunal and not the courts.
- Typically, employment tribunals consist of a chairperson, who must be a lawyer, and two other lay members, one from management and the other from an employee organisation. Employment tribunals are similar to the courts in that they are based on the adversarial procedure, but are more informal. However, in most cases, employers and, to a lesser extent, employees are represented by lawyers.
- Employment tribunals may award reinstatement, re-engagement and compensation. In practice, employment tribunals rarely award reinstatement or re-engagement. Appeals from an employment tribunal, on matters of law only, are to the Employment Appeal Tribunal (EAT), which is an appellate court within the civil court system.
- Historically, one of the hallmarks of UK employment law has been that the financial awards employment tribunals could make were capped by statute. For example, the normal maximum award for unfair dismissal is currently £69,900, although most awards are far less. However, there are no caps on discrimination claims and certain types of unfair dismissal claims.

Recruitment and selection

Legislation is in place to ensure that selection and recruitment procedures observe the principle of equal opportunities and that applicants are fairly selected on merit and suitability for the job in question. There is legislation in place to preclude employers from discriminating against employees and potential employees on the grounds of sex, race, disability, age, religion or belief, and sexual orientation.

The legislation in respect of each of these areas of discrimination differs in certain ways but, broadly, employers are precluded from discriminating against employees for the above reasons, either directly or indirectly, and there are special provisions, for example, to make reasonable adjustments to accommodate disabled employees.

It should also be noted that under the Equal Pay Act 1970, men and women who carry out similar work (i.e. work that has been rated as being equivalent by a job evaluation scheme or work that is of equal value) must have the same pay and employment conditions. It is an offence for the employer to show that there is a genuine material factor (GMF) other than the difference in sex that justifies the difference in pay or conditions.

Typically, factors such as performance, qualifications and experience are used in a GMF defence. However, the onus is on the employer and so it is important to have good records explaining the reasons for decisions on pay and conditions.

There are specific provisions under the Rehabilitation of Offenders Act 1974 dealing with criminal convictions. This legislation provides that after a period of time, people who have been convicted of a criminal offence and those who have served their sentence are, with some exceptions, not obliged to disclose those convictions. The length of time which must lapse before a person's convictions become 'spent' depends upon the nature of the sentence imposed. Certain sentences, such as imprisonment or custody for life, can never become spent.

It is also unlawful to refuse a person employment because they are or are not a trade union member, or because they will not agree to become or cease to be a member. Any person who is refused employment for such a reason will be able to make a claim in an Employment Tribunal.

Employment status

A person may be employed as an employee or as an independent contractor (self-employed) and recent legislation has created the hybrid category of the "worker". The criteria used in England and Wales by HMRC (the UK taxation authority) and the courts to determine employment status are extensive. Great care must be taken in this area in order to avoid serious exposure.

There are a number of pieces of legislation and case law on employment status, including governing the right of those on indefinite and fixed-term contracts; part-time workers; fixed-term employees and agency workers.

Discipline and dismissal

The right to suspend an employee without pay for disciplinary reasons should be the subject of an express provision of the written particulars of employment. It may be necessary to suspend an employee where, for example, an investigation is necessary to examine a claim of serious misconduct against the employee.

Termination of the contract of employment by the employer may give rise to an action at common law for wrongful dismissal for breach of the contract and/or for a statutory claim for unfair dismissal. Wrongful dismissal claims in excess of £25,000 should be brought in Civil Court, not the Employment Tribunal. All other wrongful and unfair dismissal claims are presented to an Employment Tribunal. Although wrongful dismissal and unfair dismissal are sometimes connected, they are separate legal rights with different rules and remedies.

Workforce reductions/closures

Redundancy is one of the potentially fair reasons for dismissal. It is defined by statute as a dismissal attributable, wholly or mainly, due to either the fact that the employer has ceased, or intends to cease, to carry on the business for the purpose for which the employee was employed, or the fact that the requirement of the business for employees to carry out work of a particular kind has ceased or diminished, or is expected to, altogether, or at the place where the employee was employed.

There are statutory redundancy payments to which redundant employees are entitled, subject to a two-year qualifying period. Many employers also have their own contractual redundancy (severance) policies that are considerably more generous than the statutory provisions and often of a wider application than the limited statutory definition of redundancy.

An employer should give an employee as much warning as possible of an impending redundancy and it must consult with the employee and assist them in finding alternative employment, in particular within its business. Failure to do so may give rise to an unfair dismissal. Special collective consultation rules apply where 20 or more redundancies are contemplated. The employer is required to consult with recognised trade unions or elected employee representatives for a minimum period of 30 days (90 days if 100 or more redundancies are contemplated).

Under the EU Information and Consultation Directive 2002, new rules to require employers to inform and consult with employee representatives about proposed changes and developments were introduced from April 2005. These regulations can compel employers to establish formal arrangements with employees to carry out consultation and provide information in the workplace if employees request such arrangements.

Pay, pensions and other benefits

An employee is entitled to an itemised pay statement at or before every payment of wages or salary. This will also provide for the taxation and national insurance contributions that must be deducted from the employee's gross salary.

Under the National Minimum Wage Act 1998, there is an obligation to pay employees a minimum wage. The current minimum wage is £5.73 per hour for individuals aged 22 years or over; £4.77 for individuals 18-21 years old and £3.53 for individuals aged 16-17.

Generally, an employer may not make a deduction from the wages of any employee unless it is required or authorised to be made by virtue of any statutory provision or by any relevant provision in the worker's contract or the worker has previously agreed in writing to the deduction.

All non-exempt employers are required to designate and provide access to a 'stakeholder pension scheme' for employees. However, this does not mean that employers are required to set up or contribute to a stakeholder scheme. Instead, stakeholder schemes will primarily be offered by commercial financial services companies.

It has become increasingly popular for employers to provide private health insurance coverage to its staff, particularly those in senior positions.

There are also statutory provisions governing sick pay, maternity rights, maternity leave and the right to return to work, statutory maternity pay, and parental, paternity and adoption leave. Again, companies often provide benefits over and above the statutory minimum.

Hours of work is regulated by the Working Time Regulations 1998, which also provides for a minimum holiday entitlement for employees. Workers are currently entitled to 24 days' leave and pro rata for part-timers. From 1 April 2009 the entitlement will increase to 28 days leave.

Under legislation introduced by the Employment Act 2002, parents who have been continuously employed for 26 weeks are entitled to make an application that their employer agrees to a change to their hours or place of work, to allow them to care for a child under the age of 6 years (or under 18, if disabled). There is a process to be undertaken and it is possible for the employer to refuse the application on specified grounds, such as cost or detrimental impact on performance.

Employees' rights and remuneration

Various laws govern labour/management relations in the UK.

Pregnant employees are entitled to 26 weeks maternity leave and 26 weeks additional maternity leave. The 1999 Employment Relations Act introduced a statutory procedure for trade unions to obtain recognition to negotiate on behalf of the workforce or a bargaining unit within the workforce (in companies with more than 20 employees). The legislation also gives employees the right to be accompanied by a trade union representative during grievance or disciplinary procedures, regardless of whether their company recognises unions.

The 2002 Employment Act further broadened family leave and addressed other issues such as dispute resolution in the workplace and rights of fixed-term employees.

Under the European Information and Consultation Directive, firms with 50 or more employees are required to inform and consult with staff on a regular basis about company-related issues. For the rules to apply, a request must be made by at least 10% of employees in the organisation (or employers may choose to introduce the process).

Amended rules on sex discrimination took effect from 1 October 2005, implementing the Amended Equal Treatment Directive.

Working hours

Employees in the UK have gradually come to work a shorter basic week, although hours worked generally exceed those in other European countries. The average actual weekly working hours for all full-time workers is about 39 hours.

The overtime pay rate is usually higher than the basic rate, with Saturday work commanding a higher premium than weekday overtime (when a five-day week prevails). Work on Sundays and holidays often involves payment of a 100% premium.

Pensions

The state provides a flat-rate pension and the State Second Pension (S2P). National insurance contributions (NIC) payable by employers and employees who “contract out” of S2P are lower than the contracted-in rates, which entitle employees to the state second pension. The employer, not the employee, decides to contract out of an occupational pension scheme. However, employees are no longer forced to join company pension plans but may instead subscribe to personal pension plans and gain the contracting-out rebate.

Companies with five or more staff that do not already have a company pension scheme must offer “stakeholder pensions” to their employees. Employers must shoulder the administrative costs of setting up and operating the scheme, which include deducting employees’ contributions from pay. Employee participation in the scheme is voluntary, as are employer contributions to their employees’ pensions.

All employees in private pension schemes have the right to carry their occupational pensions from job to job, although there are limits to the indexation of benefit levels on leaving earlier jobs.

Assuming an employee is not contracted out of the State Earnings Related Pension Scheme (SERPS), an employee pays no NIC on the first £105 of weekly earnings, then 11% on the portion of weekly earnings between £105.01 and £770, and 1% on all earnings exceeding £770. If the employee is contracted out, the 11% rate is reduced to 9.4%.

Social insurance

Social security charges are called national insurance contributions (NIC). This state scheme finances industrial injury compensation, sickness benefit, unemployment benefits and old-age pensions.

A job-seeker’s allowance is available for a single person aged 25 years or older.

Employers administer sick pay and maternity pay. Sick pay may be partially refunded to firms that have an unusually large proportion of their workforce ill in any given month.

Other benefits

Workers are entitled by law to four weeks of annual paid leave; most companies grant paid vacations of four to six weeks. There are eight recognised public holidays, although employers do not have to give employees these days as additional paid leave.

Other voluntary fringe benefits may be offered. They include the provision of free or subsidised meals in company canteens or of partially tax-free luncheon vouchers. Private medical insurance and the use of company cars are also common perks. Employers sometimes arrange for banks and building societies to offer subsidised mortgages.

Benefits received by employees earning £8,500 or more per year are regarded as taxable income. The government requires employers to pay NIC on the major non-cash employee benefits, such as company cars. Employers’ NIC have been extended to cover all taxable employee benefits in kind, such as fixed-period transport tickets, club-membership fees, education fees for employees’ children and employer-provided interest-free loans (above £5,000) for various purposes. Company-paid pension contributions and free in-house lunches are tax-exempt. Non-cash benefits remain popular, despite being taxable.

Termination of employment

Employers must provide severance pay at dismissal for all redundant employees with at least two years of service. For each year of service performed from ages 18-21, the redundant employee receives a half-week of pay; from ages 22-40, one week of pay; and from ages 41-65, one and a half weeks of pay. Payments are based on the last wage earned, up to a maximum of £250 a week, and the maximum payment is 30 weeks of pay as a basic award.

Labour-management relations

Except in certain industries, the law requires that a contract of employment covers full-time employees. A few industry agreements apply to all employees, but most collective agreements cover only particular skills or crafts. In most industries, union organisation is based on the branch, a geographical concept determined by the residence of the member, not the location of the plant.

The government's Advisory, Conciliation and Arbitration Service arbitrates disputes and generally promotes improvement of industrial relations.

Transfer of undertakings

The purpose of the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) protects employees where an identifiable part of an employer's operations changes hands (e.g. on the outsourcing of a particular activity). The regulations have recently been updated and now include guidance on recognising a transfer, impact on insolvent businesses and changing terms and conditions of employment and revised obligations to provide information associated with the transfer.

The primary effects of TUPE are:

- Employees engaged in a transferred undertaking are automatically transferred to the new employer on their existing terms and conditions.
- The automatic transfer is subject to the rights of the individual employees to object. However, except in limited circumstances, the effect of an objection is that the employee's employment is terminated by the transfer so that the employee has no rights in relation to the termination of employment against either of the employers.
- Pre-transfer liabilities relating to relevant employees are also transferred to the new employer except for any criminal liabilities.
- Any dismissal by reason of the transfer is automatically unfair, unless it is for an "economic, technical or organisational reason entailing change in the workforce".
- The employer is under a duty to inform the appropriate representatives of affected employees of the proposed transfer. If measures are proposed in relation to affected employees, consultation with appropriate representatives is required. Consultation must commence in good time so as to enable it to be carried out prior to the transfer taking place.
- Any agreement to contract out of TUPE is void.

Other employment issues

Other employment issues that are regulated in the UK include data protection, whistle-blowing (disclosure by an employee of malpractice by their employer), restrictive covenants (the ability of employers to restrict key employees to work for competitors or from poaching from employees or customers) after they have left employment and trade union recognition. There is legislation governing these issues.

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